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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 754

IRVING BREITOWICH,

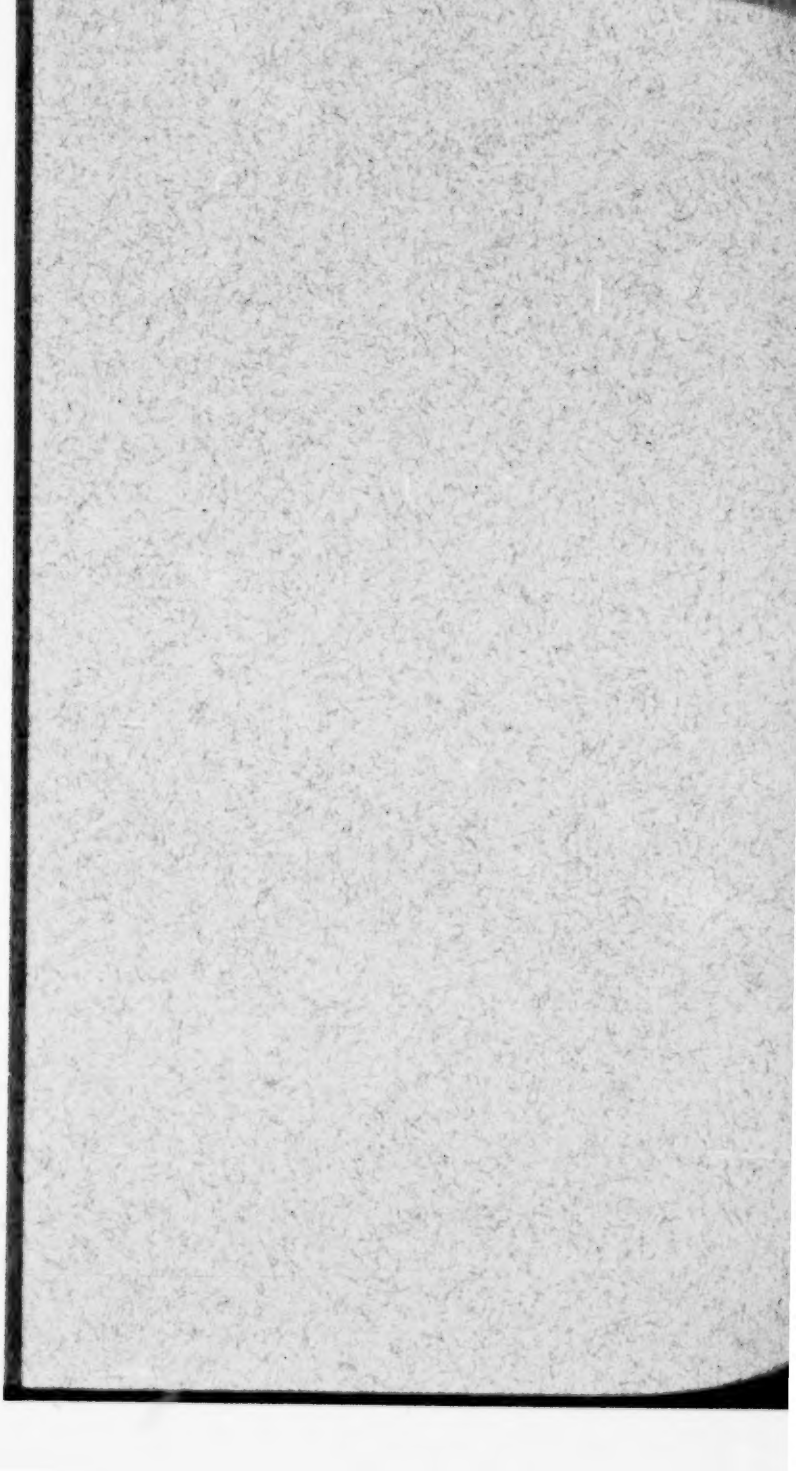
Petitioner,

vs.

MARGARET THARP AND STANDARD PROCESS CORPORATION, A CORPORATION, GARNISHEE

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT

EDWARD S. KING,
ODE L. RANKIN,
Counsel for Petitioner.



INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary and statement of matter involved	2
Contentions as to the right and jurisdiction of this court to review said judgment	5
How the federal question was raised upon the record and decided	6
Questions presented	10
Reasons relied upon for issuance of the writ	12
Specifications of errors	17
Prayer for writ	18
Brief in support of petition	19
Opinion below	19
Jurisdiction	19
Summary of argument	19
Statement of the case (See petition)	22
Argument	22
Point I	22
Point II	27
Point III	32
Conclusion	35

Table of Cases Cited

Blacklidge, In re petition of, 359 Ill. 482	9
Breitowich v. *Standard Process Corporation*, 323 Ill. App. 261	2,19
Buck v. *Alex*, 350 Ill. 167	21,30
Chesapeake & O. R. Co. v. *Mihas*, 280 U. S. 102	5
Chicago, etc. R. Co. v. *Hedges*, 105 Ind. 398, 7 N. E. 801	19,26
Currence v. *Fisher Body*, 54 Ga. App. 457, 188 S. E. 268,	9,20,28
Davis v. *Aetna Acceptance Co.*, 293 U. S. 328	5,6,15
Dutkiewicz, In re, 27 F. 2d 335	16
Evens v. *Texas Pac-Missouri Pac etc.*, 134 F. 2d 275, 319 U. S. 756	9,15,21,33
Greenfield v. *Tuccillo*, 129 F. 2d 854	16

Page

Greene, In re, 87 F. 2d 951 16,20,28,29
Greene v. *Noonan,* 372 Ill. 286 30
Harris v. *Piggly-Wiggly Stores,* 236 Ill. App. 392 ... 19,24,29
Jernberg v. *Mix,* 199 Ill. 254 9
Kreitlein v. *Ferger,* 238 U. S. 21, 228 Ill. 425 7,20,21,31
Lesser v. *Gray,* 236 U. S. 70 5,6
Lewis v. *Roberts,* 267 U. S. 467 15
Local Loan v. *Hunt,* 292 U. S. 234 6
McIntyre v. *Kavanaugh,* 242 U. S. 138 14
Minneapolis & K. Co. v. *Rock,* 279 U. S. 410 5
Peters v. *United States,* 177 Fed. 885 14
Reell v. *Cent. Ill. E. & G. Co.,* 317 Ill. App. 106 29
Rogers v. *Doody,* 119 Conn. 532 9,21,32,35
Schoenbacher v. *Kadetsky,* 290 Ill. App. 28 8,9
Southern Ry. Co. v. *Weatherly,* 153 Ala. 171, 44 So. 1019. 19,26
Tinker v. *Colwell,* 193 U. S. 473 14
Trucking Co. v. *Fairfield,* 192 Ohio St. 519 8,9
Van Norman v. *Young,* 228 Ill. 425 7,20,31
Waldrens Express v. *Krug,* 291 Ill. 472 32
Wegner, In re, 88 F. 2d 899 17,20,29
Western Brewery v. *Meredith,* 166 Ill. 306 25
Woodward Iron Co. v. *Finley,* 189 Ala. 634, 66 So. 587. 19,25

STATUTE CITED

Judicial Code, sec. 237b, 28 U.S.C.A. sec. 344 5,19

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Sec. 500 9,34
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Sec. 500, comment f, page 1296 21
Thompson on Negligence, Vol. 6, sec. 7465—29 CYC 574 19,26
R.C.L., Vol. 20, p. 21, sec. 15 9

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IRVING BREITOWICH,

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vs.

MARGARET THARP AND STANDARD PROCESS CORPORATION, A CORPORATION, GARNISHEE,

Respondents

Petition to Review Record of Appellate Court of Illinois for the First District, Chicago, Illinois (Nisi prius No. 42718).

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Judges of the Supreme Court of the United States:

Petitioner, Irving Breitowich, respectfully shows to the Court that he is a citizen of the United States of America, and a resident of the County of Cook and State of Illinois.

That he prays that this Court take jurisdiction of and review a judgment of the Appellate Court of Illinois, First District, which became final in said Appellate Court when the Supreme Court of Illinois, the highest judicial tribunal of that State, denied a Petition for leave to appeal thereto from said Appellate Court.

The Federal question here presented for review is the ruling of the Appellate Court of Illinois that a judgment for personal injuries recovered against Petitioner by Margaret Tharp is for a wilful and malicious injury within the meaning of the exception to discharges from such obligations contained in Section 17 of the National Bankruptcy Act, and therefore, not dischargeable.

The case is reported as *Breitowich* v. *Standard Process Corporation,* 323 Ill. App. 261.

Summary and Statement of Matter Involved

Margaret Tharp, respondent, recovered a judgment for $10,000.00 against Petitioner as by default in the Superior Court of Cook County, for personal injuries received when she was struck by an automobile driven by Petitioner while she was walking across a street intersection in Chicago, Illinois.

The complaint states that there were traffic signals at Chicago Avenue and LaSalle Street in Chicago; that plaintiff was in the act of crossing Chicago Avenue, going North on the West side of LaSalle Street after the lights changed to green for North and South traffic; that defendant was driving an automobile East in Chicago Avenue, and as a result of defendant's driving, she received the injuries for which she sued.

The complaint contained four charges: (1) general negligence; (2) failure to keep car under control; (3) failure to keep a proper lookout so as to discover plaintiff crossing the street, and (4) the charge that defendant "wantonly, wilfully and without regard for the safety of plaintiff, ran said automobile without heeding the certain traffic signal then and there set against him, as alleged, and as a result thereof, struck plaintiff with great force and violence."

Petitioner, there a defendant, had appeared and answered the Complaint, and the cause was at issue when it was called for trial on September 13, 1939; but, in the absence of petitioner and his counsel, a default for a supposed want of appearance, or answer, was entered, and the cause was submitted to a jury upon evidence as to damages only. There was no special interrogatory put to the jury as to wilful and malicious injuries. The jury assessed plaintiff's damages by general verdict in the sum of $10,000.00 upon which judgment was entered. No appeal was taken therefrom. Time ran and the judgment became final.

On February 6, 1940, Petitioner filed a petition in bankruptcy, in the United States District Court, Eastern Division, Northern District of Illinois, in which said judgment was scheduled as a liability, and on May 10, 1940, Petitioner was discharged in bankruptcy by said District Court.

On March 1, 1943, Margaret Tharp, commenced a garnishment proceeding upon her judgment against Standard Process Corporation, which answered money of defendant in its hands. Petitioner intervened in said proceeding, by leave of court, and moved to quash the summons, discharge the garnishee and dismiss the garnishment proceeding, showing in his motion that subsequent to the rendition of the judgment, Petitioner had filed his Petition in Bankruptcy, in the District Court of the United States, at Chicago, Illinois, had scheduled said judgment as a liability, and that on May 10, 1940, he received a discharge therefrom in bankruptcy, and that he was accordingly relieved of his liability on said judgment.

The plaintiff, Margaret Tharp, answered Petitioner's intervening Petition and claimed that her complaint in said cause set up a cause of action of which malice was the gist, that the verdict and judgment were predicated thereon,

and that the terms "wilful and wanton," as used in her complaint, had the same meaning as the terms "wilful and malicious," as employed in Section 17 of the National Bankruptcy Act, and that, for such reason, such discharge in bankruptcy was not a bar to the obligation of her judgment.

No evidence was offered by either party, and the decision passed upon the judgment record and the supplemental proceedings.

The Superior Court of Cook County, upon consideration of the record thus made, held that the proceeding in bankruptcy relieved Petitioner of further liability on said judgment for the reason that it did not come within any exception contained in Section 17 of the Bankruptcy Act, and ordered the garnishee discharged and dismissed the garnishment proceeding.

Respondent, Margaret Tharp, then removed the cause to the Appellate Court of Illinois, First District, by appeal, where the judgment of the trial court was reviewed.

The Appellate Court of Illinois reversed the order of the trial court, finding that the record did not show *wilful* misconduct by Petitioner, but did show, however, that Margaret Tharp's injuries were caused by *wanton* misconduct, and that within the meaning of "our laws",—meaning Illinois Law—malice was the gist of the action; and that, therefore, the liability of Petitioner on said judgment was not released under the terms of Section 17 of the Bankruptcy Act.

The ultimate holding of the Appellate Court, therefore, was, without it having so stated, that the judgment was for wilful and malicious injuries to respondent, within the meaning of Section 17 of the Bankruptcy Act.

The Appellate Court of Illinois denied a Petition for Rehearing (R. 16), and then stayed its mandate pending

Petition of defendant to the Supreme Court of Illinois for leave to appeal the cause to that court (R. 17).

Petitioner then filed in the Supreme Court of Illinois his Petition for Leave to Appeal said Appellate Court judgment to the Supreme Court of Illinois, which Petition the Supreme Court of Illinois considered and denied (R. 18).

The Appellate Court of Illinois then further stayed the issuance of its mandate pending this Petition to the Supreme Court of the United States for a Writ of Certiorari to review said judgment (R. 19).

Contentions as to the Right and Jurisdiction of This Court to Review Said Judgment

The Supreme Court of Illinois is the highest judicial tribunal of the State of Illinois, and by its denial of said Petition, the judgment of the said Appellate Court of Illinois became final, and Certiorari of this Court to review said judgment, if allowed, issues direct to the said Appellate Court of Illinois, First District, at Chicago, Illinois. (*Chesapeake & O. R. Co.* v. *Mihas,* 280 U. S. 102; reversing 249 Ill. App. 446; *Minneapolis & K. Co.* v. *Rock,* 279 U. S. 410; reversing 247 Ill. App. 600; *Davis* v. *Aetna Acceptance Co.,* 293 U. S. 328, reversing 273 Ill. App. 628.

It is contended that the decision made by the Appellate Court of Illinois to the effect that Petitioner's discharge in bankruptcy here in question does not discharge the obligations of Plaintiff's judgment on the ground that it falls within the exceptions to discharges found in Section 17 of the National Bankruptcy Act, denies to Petitioner the effectiveness of his discharge in bankruptcy and, being erroneously decided, presents a Federal question which this court may review by certiorari, by virtue of Section 237 of the Judicial Code (28 U. S. C. A., Sec. 344). (*Lesser*

v. *Gray*, 236 U. S. 70; *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328.)

This Court, in cases alike in principle, has also taken jurisdiction to hold that the District Courts have equitable jurisdiction to restrain by injunctive process proceedings in State Courts to prevent judgment creditors from using garnishment proceedings and other process in defiance of discharges in bankruptcy. (*Local Loan* v. *Hunt*, 292 U. S. 234.)

It is, therefore, contended that this court has therefore jurisdiction to review said cause and correct said judgment of the Appellate Court of Illinois.

How the Federal Question Was Raised Upon the Record and Decided

The Federal question was first raised upon this record by Petitioner when he presented to the Superior Court of Cook County his discharge in bankruptcy as a bar to the garnishment proceeding based upon respondent's judgment, which had been scheduled as a liability of Petitioner in the bankruptcy proceeding. The judgment creditor confessed the existence of the discharge, but sought to avoid its effect by the claim that she was not barred because her judgment was for wilful and malicious injuries to her person within the meaning of Section 17 of the National Bankruptcy Act.

The proceeding being in the original suit, in which said judgment was rendered, the record thereof was before the court for judicial cognizance, and it was opened up by the plea of discharge in bankruptcy and plaintiff's plea of confession and avoidance, so that the whole record stood exposed to judicial view.

The discharge in bankruptcy being general, the presumption was that it discharged all obligations of every nature,

and the burden was on plaintiff to show the court that the judgment reflected an obligation mentioned in Section 17 of the Act as not dischargeable. (*Kreitlein* v. *Ferger*, 238 U. S. 21, 26; *Van Norman* v. *Young*, 228 Ill. 425.)

The plaintiff made no showing, or offer of proof, outside of the record, and rested thereon.

The trial court ruled that "said judgment did not come within any of the exceptions employed in Section 17 of the Federal Bankruptcy Act", and that Petitioner's discharge in bankruptcy "relieved him of any further liability" on the judgment in question (R. 8).

Respondent, Margaret Tharp, appealed and assigned and argued as error in the Appellate Court of Illinois that the trial court erred in holding that her judgment in question was discharged and barred by the bankruptcy discharge issued in the proceedings in the District Court of the United States, Northern District of Illinois, Eastern Division.

The matter was briefed and argued in the Appellate Court of Illinois, and upon consideration thereof, the court stated that the dispute between the parties was whether the judgment was for a wilful and malicious injury to plaintiff, and that that was the sole question before that court for decision.

The Appellate Court of Illinois then found that Petitioner was not guilty of *wilful* misconduct, but was guilty of *wanton* misconduct only; and then held that malice was the gist of the action under "our law,"—Illinois law—and that the obligation of the judgment was not, therefore, released by said bankruptcy discharge.

The Appellate Court of Illinois stated in its opinion:

> "As pointed out in Schoenbacher v. Kadetsky, 290 Ill. App. 28, there is a distinction between the terms "wilful" and "wanton" as used in such cases. We there said 'the term wilful * * * implies intent or purpose, while the term wanton expresses a reckless

disregard of consequences. Trucking Co. v. Fairchild, 128 Ohio St. 519'."

The Appellate Court of Illinois then held in this case:

> "We hold that the allegations of the complaint were sufficient to charge defendant with such wanton misconduct as implies a reckless disregard of consequences" (R. 14).

Thus the Appellate Court of Illinois held that the complaint in this case states only a charge of wanton misconduct, implying a reckless disregard of consequences, as distinguished from wilful misconduct, implying intention.

The Appellate Court of Illinois then, upon such holding of wanton misconduct, drew the following conclusion of law:

> "Malice within the meaning of *our law* is the gist of the charge, and that under the terms of Section 17 of the Bankruptcy Act, Breitowich was not released by the judgment entered in that (Bankruptcy) proceeding." (Italics ours) (R. 14).

In the case of *Schoenbacher* v. *Kadetsky*, 290 Ill. App. 28, the opinion was written by Mr. Justice O'Connor who also wrote the opinion in this case. In the *Schoenbacher* case, the Jurist differentiated the terms "wilful misconduct", and "wanton misconduct", holding there that wilful misconduct implied intent or purpose, whereas wanton misconduct meant reckless disregard of consequences, and there, by way of illustration of his views, he said:

> "We may surmise a case of an automobile collision at a street intersection where the defendant intended to injure the plaintiff but those cases do not happen in actual practice. We have never had any such case in this court." (290 Ill. App. 34).

We respectfully suggest that the clear cut view of the Appellate Court that there was no wilfulness in Petitioner's conduct was a holding which definitely implied that the

judgment was not based on an obligation for wilful and malicious injuries to plaintiff; and we suggest that the holding that the conduct of defendant was wanton misconduct negatives any thought that there was any wilfulness or maliciousness in the judgment; and that therefore the Appellate Court drew the wrong legal conclusion from the Court's premise that there was no wilfulness in the judgment. (*Evens* v. *Texas Pac-Missouri Pac*, etc. 134 Fed. (2d) 275, Certiorari denied here; *Trucking Co.* v. *Fairfield*, 192 Ohio St. 519; *Schoenbacher* v. *Kadetsky*, 290 Ill. 28; R. C. L. Vol. 20, p. 21, Sec. 15; Amer. Law Inst. Restatement Torts, Sec. 500).

We suggest that in wantonness there is no wilfulness, and a judgment based upon wanton misconduct is dischargeable in bankruptcy. (*Rogers* v. *Doody*, 119 Conn. 532).

We also respectfully suggest that the ruling of the Appellate Court, that malice is the gist of the cause of action set up in the complaint, is not tenable under decisions of the Supreme Court of Illinois, which holds that malice is only the gist of an action, when malice is its essential basis; that may be made the gist of an action by properly pleading it as the basis of the action; that malice when pleaded, carries the implication that the defendant was actuated with an intention to perpetrate an injury on the plaintiff. (*Jernberg* v. *Mix*, 199 Ill. 254; *In re Petition of Blacklidge*, 359 Ill. 482.

We also suggest that the decision in the Appellate Court of Illinois is in disagreement with the case of *Currence* v. *Fisher Body*, 54 Ga. App. 457, 188 S. E. 268, where it was decided that where a complaint showed a charge of negligence, and one for wilful and wanton misconduct, and the judgment was general, the burden was on plaintiff to show on which charge the judgment was based, when a discharge in bankruptcy was pleaded thereto; and the record failing to show which the judgment was held to be discharged.

We therefore suggest that the Appellate Court of Illinois erroneously decided the Federal question upon the record, and that, upon the record, as well as upon its own findings, it should have held that the discharge in bankruptcy released the obligation of said judgment.

Questions Presented

I

The main question presented by the record is whether the obligation of the instant judgment for personal injuries is one for "wilful and malicious injuries to the person" of Margaret Tharp, respondent.

Subordinate to the main question, there are several questions arising upon different views of the record:

II

Is the defendant charged in the complaint with having inflicted a wilful and malicious injury upon the person of respondent, or is the charge one of less gravity?

III

Does the allegation that her injuries are the result of a wilful and wanton operation of the automobile without heeding the stop sign, and without regard for her safety, charge a wilful and malicious injury to her person, or is such charge a mere conclusion of the pleader without factual substance, and one of negligence only?

IV

Does the complaint state a cause of action for wilful and malicious injuries without stating that the defendant was in a position of danger from the continued operation of defendant's automobile, and that defendant knew of her posi-

tion of danger and, yet so knowing, did nothing to avoid striking her; is such pleading a pure conclusion as to the charge made and, as worded, does it state negligence only?

V

Where there were several charges of negligence in the complaint, and only one charge of wilful and wanton misconduct; and where plaintiff offered no proof to show upon which charge the judgment rested, does the law presume that the judgment rests upon the lesser charge of negligence?

VI

Will the law without proof, and in the absence of a positive finding, and judgment in the record, presume that one has been guilty of a wilful and malicious injury to another, where there are other lesser charges in the complaint?

VII

Can a default judgment entered upon a Complaint for wilful and wanton misconduct in the driving of an automobile be construed to be the equivalent of a charge of causing wilful and malicious injuries to the person where there was an answer on file, and where no evidence was presented to the jury upon the question of liability, and where the record does not speak any finding or judgment that there was any wilful and wanton injury to the plaintiff; and can such a record stand superior to a general discharge in bankruptcy?

VIII

Does the charge that respondent wilfully and wantonly ran his automobile past a stop signal, and as a *result* thereof injured plaintiff, charge or imply an intent or purpose to wilfully and maliciously injure the plaintiff, or is it a charge of wanton negligence?

IX

Where no evidence as to liability was heard, and no record made to show upon which charge the judgment was based, will the court, as against a general discharge in bankruptcy, presume a wilful and malicious injury to have been inflicted where wilful and malicious injury is not specifically pleaded, and where there are charges of negligence upon which the judgment can stand?

Reasons Relied Upon for Issuance of the Writ

I

The Appellate Court of Illinois has passed upon the Federal question here presented in a way that, it is contended, is not in accord with the decisions of this Court, the Federal Courts, nor of the Courts of other States.

II

The decision of the Appellate Court of Illinois has deprived Petitioner of the benefit of a discharge in bankruptcy by adjudicating the priority of State processes over that of the United States, without a controlling record upon which to base such decision.

III

Uniformity of decisions in the various jurisdictions of the nation which from time to time have to decide whether certain judgments "are liabilities for wilful and malicious injuries to the person, or property of another" within the meaning of Section 17 of the National Bankruptcy Act, will be advanced by a review of this case by this Court.

IV

There are practical reasons why the Court should take this case for review, and give a workable reference for the bench and bar.

We can find no decision in this court in an automobile case, now perhaps the largest field of the law, presenting questions of wilful and malicious injuries to persons or property. Since the passage of the Bankruptcy Act, the entire field of automobile law, with all its complexities, has developed. For a period of time, wilful and wanton misconduct were largely treated together for the obvious reason that the plea of contributory negligence applies to both grades or concepts of conduct. In recent years, refinements have become necessary because of new laws regulating conduct with reference to the use and ownership of automobiles.

It has now become definitely recognized that there are three grades of conduct with a right of action for each: negligence, wanton misconduct, and wilful misconduct. Negligence is negative inadvertence; wanton misconduct or recklessness, with no element of intention; and wilful misconduct, which carries an implication of intention and malice. For negligence and wanton misconduct, a discharge in bankruptcy is a bar; for wilfulness and malice, it is not.

A review of this case in this Court will give a useful case for Jurists, who must decide such cases, and lawyers, who must prepare and plead them.

This case presents several questions for decision: sufficiency of the pleading in the judgment record to charge a wilful and malicious injury; sufficiency of the judgment record to form an exception to discharges in bankruptcy; whether, where there are more than one count, counts for negligence and a count for wilful and wanton misconduct,—

which shall govern when there is a default, and no controlling indication in the record on which the judgment rests; these, and others. A decision will have a tendency to harmonize the various Federal and State Court decisions, as well as point the way to the future.

This Court has taken for review a few cases where the question of wilful and malicious injury to persons or property were involved in State Court decisions, or where Federal Courts had decided questions of such wide importance proper to be reviewed here. A brief statement of those cases will point out that this case should be added to the list as covering a field in which no controlling opinion of this court has been rendered.

In *Tinker* v. *Colwell*, 193 U. S. 473, (1904), which was a writ of error to the Supreme Court of Appeals of New York, the question was, whether a tort judgment for criminal conversation was one for wilful and malicious injuries to the person or property of the plaintiff, so as to fall within the exception to discharge in bankruptcy. The Court held it was both wilful and malicious, and affirmed the decision of the Supreme Court of Appeals of New York. This case is much cited in automobile cases, because of its definitions and illustrations.

In *Peters* v. *U. S.*, 177 Fed. 885 (1910), this Court (217 U. S. 606) denied a certiorari to review a decision of the Seventh Circuit Court of Appeals, which had decided that where the nature of the offense, assault of a pupil by a teacher, appeared in the pleadings, and malice was the gist of the action, that the judgment was for a wilful and malicious injury and not dischargeable in bankruptcy, making that decision final.

In the case of *McIntyre* v. *Kavanaugh*, 242 U. S. 138 (1916), this court held that a discharge in bankruptcy did

not protect one who had converted funds, and was found to have "committed wilful and malicious injury to the property of plaintiff." (P. 140.)

In the case of *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, (1934), it was held that a discharge in bankruptcy was a bar to a declaration in trover where the trial judge had held that the defendant "was not actuated by wilful, malicious, or criminal intent," and yet, gave judgment generally notwithstanding the discharge. The Appellate Court of Illinois having affirmed the judgment, (273 Ill. App. 628), and having repeated the finding of the trial judge, without disapproval, it was held that the special finding controlled, and the discharge was operative, and the Appellate Court of Illinois was reversed.

In the case of *Lewis* v. *Roberts*, 267 U. S. 467, (1925), this Court reviewed and reversed a decision of the Fifth Circuit, which had held that a judgment in tort for negligence was not a provable claim in bankruptcy, and settled that contention, holding that any such judgment might be proven as a claim.

In *Evens* v. *Texas Pac. Missouri Pac. T. R. R.*, 134 Fed. (2d) 275, (1943), the Fifth Circuit Court of Appeals differentiated between wilful misconduct and wanton misconduct, and held there was evidence on which the case should be submitted to the jury on wanton misconduct, but not on wilful misconduct. This Court denied certiorari upon the record (*Evens* v. *Texas Pac. Mo. Pac.*, 319 U. S. 756, No. 922), thus recognizing the distinction between these two causes of action. The Circuit Court of Appeals there defined wanton negligence as follows:

> "Wanton negligence may be generally defined as an act (or failure to act when there is a duty to act) in reckless disregard of the rights of another, coupled

> with a consciousness that injury is a probable consequence of the act or omission."

And having defined wanton negligence, that Court said:

> "The negligence of the red-cap was not wilful, for that term usually connotes an act intentionally done for the purpose of causing injury, but we think the evidence made an issue for determination by the jury as to whether the servant was guilty of wanton negligence." (P. 276.)

Thus, this Court placed the stamp of approval on the ruling that wanton misconduct has no element of intention in it, and is a different cause of action than that of wilful misconduct. A review of this case by this Court will settle several perplexing questions now facing trial courts, and those of appeal as well.

There are several cases which purportedly show that wanton misconduct will support a judgment for wilful and malicious injuries, but when examined, it is seen that the conduct in question was really wilful misconduct, and the judgment held to be for wilful and malicious injuries on the ground that the form of the pleading is not controlling. (In re *Dutkiewicz*, 27 Fed. (2d) 335; *Greenfield* v. *Tuccillo*, 129 Fed. (2d) 854).

In the *Dutkiewicz* case, the complaint was that the defendant "negligently, carelessly, and wantonly drove" his automobile; there was a default, and the judge stated the facts to the jury, and charged that negligence had been made out, and that there was no contributory negligence. The Circuit Court of Appeals held the facts stated by the judge in the record showed a wilful and malicious injury.

Also see *In re Greene*, 87 Fed. (2d) 951, where the complaint charged wilful and wanton misconduct, and the jury specially found that plaintiff was guilty of wilful and wan-

ton conduct, and the court held the judgment was for a wilful and malicious injury, and not dischargeable; and see also *In re Wegner*, 88 Fed (2d) 899, which was decided by the same court, and the opinions written by the same jurist, with both cases before court at the same period of time, which holds that a charge that plaintiff operated his automobile in a wanton and reckless manner in utter disregard for the safety of others, including plaintiff, under circumstances likely to cause great bodily injury to plaintiff, did not state a wilful and malicious act within the meaning of the Bankruptcy Act, and was dischargeable in bankruptcy.

Specifications of Errors

I

The Appellate Court of Illinois erred in reversing the judgment of the Superior Court of Cook County.

II

The Appellate Court of Illinois erred in holding that malice was the gist of the action in the suit for damages in which the judgment was entered.

III

The Appellate Court of Illinois erred in holding that the judgment was for a wilful and malicious injury to the person of plaintiff, Margaret Tharp.

IV

The Appellate Court of Illinois erred in holding that the discharge in bankruptcy granted to Petitioner did not discharge the obligation of respondent's judgment.

V

The Appellate Court of Illinois erred in holding there was a wilful and malicious injury to plaintiff, after making its finding that the record did not show a wilful injury, but showed only wanton misconduct; and erred in holding that malice was the gist of the action.

Prayer

WHEREFORE, Petitioner prays that the Court allow this petition for a writ of certiorari, and order that the writ be granted to review the said judgment of the Appellate Court of Illinois for the First District thereof.

EDWARD S. KING,
100 North LaSalle Street,
Chicago, Illinois.
Phone: State 1942

ODE L. RANKIN,
134 North LaSalle Street,
Chicago, Illinois.
Phone: Randolph 6500.

BRIEF

I

The Opinion Below

The opinion of the Appellate Court of Illinois is reported as *Breitowich* v. *Standard Process Corporation,* 323 Ill. App. 261; (See Advance Sheet No. 2 July 1, 1944), and is shown in Transcript of the record at pages 12-15.

II

Jurisdiction

The jurisdiction of this court is invoked under Section 237 B of the Judicial Code, as amended, 43 Stat. 927, 28 U. S. C. A., Sec. 344 (b), and in accordance with the statements set forth in the accompanying Petition for Writ of Certiorari under the heading of Jurisdiction which statement is adopted here.

The date of the final order of the Supreme Court of Illinois, denying Petition for Leave to Appeal, is September 14, 1944 (R. 18).

III

Summary of Argument

THE COMPLAINT UPON WHICH THE JUDGMENT RESTS DOES NOT CHARGE A WILFUL AND MALICIOUS INJURY TO THE PERSON OF PLAINTIFF WITHIN THE MEANING OF SECTION 17 OF THE BANKRUPTCY ACT. IT CHARGES ONLY NEGLIGENCE.

Harris v. *Piggly-Wiggly Stores,* 236 Ill. App. 392;
Woodward Iron Co. v. *Finley* 189 Ala. 634—66 So. 587.
Southern Railway Co. v. *Weatherly* 153 Ala. 171—44 So. 1019;
Chicago, etc. R. Co. v. *Hedges* 105 Ind 398—7 N. E. 801;
Thompson on negligence, Vol. 6 Sec. 7465—29 CYC 574.

IV

WHERE A DISCHARGE IN BANKRUPTCY IS PLEADED BY A DEFENDANT TO AN ACTION UPON A JUDGMENT, AND PROVEN, IT IS PRIMA FACIE UNDER THE STATUTE, AND THE BURDEN IS THEN CAST UPON THE PLAINTIFF TO SHOW THAT THE DEBT SUED UPON WAS BY LAW EXCEPTED FROM THE OPERATION OF THE DISCHARGE.

Kreitlein v. *Ferger*, 238 U. S. 21;
Van Norman v. *Young* 228 Ill. 425.

1

Where a proceeding is had upon a judgment based upon a complaint charging a wilful and malicious injury, and also charging simple negligence and a discharge in bankruptcy is pleaded thereto, the burden is on plaintiff to prove his judgment rests upon the wilful and malicious injury and in default of such proof the discharge operates against the judgment.

Currence v. *Fisher Body* 54 Ga. App. 457; 188 S. E. 268;

In re Greene, 87 Fed. (2d) 951 (7 CCA);

In re Wegner, 88 Fed. (2d) 899 (7 CCA).

2

Under the rule that a bankruptcy discharge is a prima facie discharge of all provable claims (*Kreitlein* v. *Ferger* 238 U. S. 21) the presumption is that any judgment is based on a dischargable obligation, which casts the burden of proving to the contrary upon the plaintiff in the judgment.

Currence v. *Fisher Body* 54 Ga. App. 457 188 S. E. 268.

3

Under the insolvent Debtors Act of Illinois, the burden is upon the Defendant seeking release from imprisonment to prove that the judgment is not one of which malice is the gist of the action. (*Buck* v. *Alex,* 350 Ill. 167, *Jernberg* v. *Mix,* 199 Ill. 254); but under the Bankruptcy Act the plaintiff in the judgment has the burden of proving that his judgment is one for a wilful and malicious injury if he wishes to avoid the effect of a discharge in bankruptcy.

(*Kreitlein* v. *Ferger* 238 U. S. 21; 228 Ill. 425).

V

A JUDGMENT BASED UPON WANTON CONDUCT IS DISCHARGEABLE IN BANKRUPTCY AS THE CHARGE DOES NOT CONTAIN THE ELEMENTS OF WILFUL AND MALICIOUS CONDUCT. WILFULNESS, WANTONNESS, AND NEGLIGENCE ARE SEPARATE AND DISTINCT CAUSES OF ACTION.

Rogers v. *Doody* 119 Conn. 532.

1

A judgment based on wanton misconduct is dischargeable in bankruptcy.

Rogers v. *Doody* 119 Conn. 532.

2

Wanton misconduct has no element of wilfulness in it.

Evens v. *Tex. Pac. etc.*, 134 Fed. (2d) 275 (Certiorari denied 319 U. S. 756);

Amer. Law Inst. Restatement, Torts Sec. 500.

3

An act is said to be reckless misconduct when there is a *strong probability that harm may result from it.* An act

is said to be intentional misconduct when there is *substantial certainty that injury will follow.*

Vol. 2, Law Inst. Restatement of Law of Torts. Section 500, comment f, page 1296.

Statement of the Case

The Summary and Statement of Matter Involved, as set forth in the foregoing Petition for Certiorari is a sufficient statement of facts, and basis for the points of law hereafter argued, and we do not therefore repeat them here.

Argument

I

THE COMPLAINT UPON WHICH THE JUDGMENT RESTS DOES NOT CHARGE A WILFUL AND MALICIOUS INJURY TO THE PERSON OF PLAINTIFF WITHIN THE MEANING OF SECTION 17 OF THE BANKRUPTCY ACT. IT CHARGES ONLY NEGLIGENCE.

The judgment in this case can rise no higher than the complaint that gives it life, and when the complaint is examined, it is seen that it does not plead in the language of the Bankruptcy Act a wilful and malicious injury to plaintiff; nor does it plead facts which show or tend to show any wilful or wanton act against plaintiff herself; but, charges only that defendant wilfully and wantonly ran the automobile *without heeding the traffic signal set against him.* There is no charge of any wilful or malicious intent to injure plaintiff, and without such charge, it would not be presumed that any such intent to injure existed. The charge is that the running of the red light *resulted* in the injury to plaintiff, not that defendant designedly or intentionally caused the injury. A large part of the complaint is imagination.

We suggest that the use of the words wilful and wanton, to characterize or describe conduct incidental to the driving of the automobile does not state anything more than a charge of negligence. A wilful and malicious injury can only result from affirmative conduct directed toward the given objective of doing an injury. Charging less than volition and intention does not charge a wilful injury tinged with malice. For we have no evidence here or factual picture to clothe the skeleton of the charge and build it up into a vicious action; it remains just what the pleader states, no more.

The language of the exception in the Bankruptcy Act is wilful *and* malicious, and it has been said that the law means both wilful *and* malicious. This statement leads to the thought that merely alleging that a driver wilfully and wantonly ran a red light does not approach a charge that a resulting injury was maliciously inflicted, for in substance the charge is only that he did not heed the red light,—not that he then knew of the position of plaintiff.

And we suggest that negative terms, such as, "as a result thereof", and "by means whereof", "whereby", and other such colorless expressions do not picture, suggest, or point to wilful and malicious injuries, which are more appropriately suggested by such words as "inflicted", "intentionally", "purposely", "deliberately", and other like terms denoting volition and affirmative, aggressive action directed toward the plaintiff.

The complaint in the case at bar charges wilful and wanton operation of an automobile past a stop signal, and concludes that the automobile, as a *result thereof*, struck the plaintiff, which does not point to an intention to injure, nor does it plead that the driving was really the proximate cause of the accident.

While it may be said that the form of the pleading does not necessarily determine the question whether the obliga-

tion reduced to judgment was for a wilful and malicious injury, that is the rule only when a weak charge is strengthened on trial by facts indicating volition and intention. Where a charge is below par, and no evidence is heard, or record made of facts or findings, to bolster it up, it remains below par, and the record speaks no louder than the complaint. Here no evidence was heard and the discharge in bankruptcy prevails over the judgment for the reason that it does not plead a wilful and malicious injury to plaintiff.

Petitioner therefore contends that upon the face of the record, it appears that there was no wilful and malicious injury pleaded in the complaint; that the characterization of actions as wilful and wanton is not the equivalent of a charge of wilful and malicious injury; and as the complaint did not plead a wilful and malicious injury to plaintiff, the record can not show such an injury, and the judgment is, therefore, dischargeable.

Another element of the charge of wilful and wanton misconduct is absent from the complaint, that of knowledge of the dangerous position of plaintiff. The complaint fails to show any surrounding circumstances except the street location, the lights, the presence of plaintiff, and of defendant driving the automobile. We may infer from the complaint that she was not seen by defendant for some reason, for she alleges that defendant was negligent in not keeping a proper and sufficient lookout to discover her presence. The element that turns negligence into wilfulness is knowledge of the dangerous position of a person, and the continued operation of the dangerous agency without attempting to avoid injury to such person.

The point is well illustrated by the case of *Harris* v. *Piggly Stores*, 236 Ill. App. 392, where the charge was of wanton and wilful operation of a truck by means of which

plaintiff was struck and injured; and likewise, alleging a wilful and wanton operation at a high, reckless, and dangerous rate of speed. There were also charges of negligence. On the trial of the case, the court by instructions withdrew the question of contributory negligence, leaving the case standing upon the wilful and wanton counts. A judgment for plaintiff was reversed for the reason that neither of the wilful and wanton counts charged any knowledge of the dangerous position of plaintiff, nor did they directly charge that the injury to plaintiff was wantonly or wilfully caused. The Court there said (p. 397):

> "They, (the two wilful counts) do not state a cause of action for wilful and wanton infliction of injury, for the very essence of such a charge is lacking, namely, injuring another through volition, with knowledge actual or implied".

And the Court there further held that the failure to state a cause of action was not cured by verdict because of the missing elements necessary to such a cause of action (p. 397).

In *Western Brewery* v. *Meredith*, 166 Ill. 306, the complaint, after alleging the facts and circumstances characterized the acts as "wilful, careless, and negligent acts of defendant"; upon trial, and during the argument to the jury, the plaintiff amended the complaint by striking out the word wilful, and it was held that the complaint all the time was a complaint for negligence only, and that striking out the word wilful did not change the charge in the complaint.

In *Woodward Iron Co.* v. *Finley*, 189 Ala. 634, 66 So. 587, it was held that a charge of a wanton or intentional misconduct in *doing an act* is not the legal equivalent of that character of misconduct *inflicting an injury* upon another. There the charge was that an engineer wantonly or wilfully

derailed some tram cars on which plaintiff was riding. The court said that obviously the averment characterized the *act*, not the *injury* as wanton or wilful.

In *Southern Railway Co.* v. *Weatherlow*, 153 Ala. 171, (44 So. 1019), Count Seven in the complaint alleged that defendant's servants "wantonly and recklessly propelled its said engine, and tender, on its track over a certain public crossing or street, but did not directly and in terms charge that the injury received was wantonly inflicted, and omitted to charge any knowledge by the servants of conditions and surroundings and a consciousness of impending danger to plaintiff. The court then said: "The facts stated constituted the count nothing more than a count in simple negligence * * *, open to the defense of contributory negligence." It is to be noted that the Court then held count four good, which directly alleged that defendant's servants "recklessly and wantonly and intentionally" inflicted the injury complained of (P. 174).

The rule is recognized by the text writers. Thompson on Negligence, Vol. 6, Sec. 7465; 29 Cyc. 574.

And where a complaint repeatedly used the words "purposely," "wilfully," and "recklessly" to characterize the acts complained of, but did not charge that defendant purposely or wilfully ran the train upon plaintiff's intestate, it was held that the allegations of the complaint amounted to no more than a charge of killing through negligence. *Chicago, etc. R. Co.* v. *Hedges*, 105 Ind. 398, 7 N. E. 801.

It is, therefore urged that the complaint upon which the judgment is based fails to charge a wilful and malicious injury to plaintiff, hence it charges only negligence which is dischargeable in bankruptcy.

The Appellate Court of Illinois should, therefore, be reversed.

II

WHERE A DISCHARGE IN BANKRUPTCY IS PLEADED TO AN ACTION UPON A JUDGMENT, AND PROVEN, IT IS PRIMA FACIE UNDER THE STATUTE, AND THE BURDEN IS CAST UPON PLAINTIFF TO SHOW THAT THE DEBT SUED UPON WAS BY LAW EXCEPTED FROM THE OPERATION OF THE DISCHARGE.

In the complaint in this case, there are three charges of negligence, and one charging wilful and wanton misconduct in the operation of an automobile. Assuming for the moment, for purposes of illustration, that the wilful and wanton charge states a separate and good cause of action for wilful and malicious injuries, which we do not concede, it is seen that the judgment covers obligations for negligence which are dischargeable, and one for wilful and malicious injuries which is an exception to discharge.

As a practical matter, the judgment rests upon one or the other, not on both. The two causes of action are inconsistent; they do not blend. So when the discharge is pleaded to the judgment, the burden is cast upon plaintiff to show in some way that the judgment rests upon the wilful and malicious charge. How can that be done when the judgment is by default, and based upon two inconsistent claims? And if the plaintiff is unable to show to the court upon which the judgment rests, or can not show that it rests with certainty upon the wilful and malicious cause of action, then he is unable to solve the riddle, and the discharge must prevail.

The very nature of the record renders it impossible for any one to say. It does not shift from one base to the other as plaintiff may wish. Which leads to the observation that when a lawyer is drafting a complaint to support a judgment, as against a discharge in bankruptcy, he should with

certainty allege that the defendant wilfully and maliciously inflicted an injury upon plaintiff; and if he includes negligence counts in the complaint, he should take his judgment upon one or the other; or he must build up his record so as to show by interrogatories or findings that the judgment is based on the wilful and malicious counts. And so it is a duty of plaintiff to make a record that speaks a wilful and malicious finding.

It is not for plaintiff to choose which count he will rely upon, for he has a burden of proving that the judgment rests upon the wilful and malicious count and pointing to that count is not proof.

Obviously the burden of proof cannot be sustained, for there is none to be had. While the judgment may be good for purposes of an execution against property, it does not answer the purposes of proving an exception to a discharge in bankruptcy, for there the obligation must certainly be for a wilful and malicious injury, not probably or possibly, but definitely.

A case in point with the problem under discussion was presented for decision in *Currence* v. *Fisher Body*, 54 Ga. App. 457, 188 S. E. 268, where a garnishment was predicated on a default judgment based upon a complaint containing a wilful and wanton count, and a charge of simple negligence. The garnishee pleaded a discharge in bankruptcy; the plaintiff there, as here, traversed the plea but offered no proof, resting upon the record as here. The court there held that the burden was on the plaintiff to prove on which cause of action his judgment rested, and there being no proof made, it was held the burden was not sustained and that the obligation of the judgment was discharged.

Another case applying the same rule is *In re Greene*, 87 Fed. 2d 951 (7 C. C. A.) where the court held that a special interrogatory to the jury answering that defendant's con-

duct was wilful and wanton, appearing with the general verdict as a basis for the judgment order, sustained plaintiff's burden of proof, and established the obligation of the judgment to be for a wilful and malicious injury and excluded from the operation of a general discharge.

Still another Federal case is *In re Wegner*, 88 Fed. (2d) 899 (7 C. C. A.), where the court held that a charge in a complaint of wanton and reckless injury would not overcome a general discharge in bankruptcy because it did not make an obligation for a wilful and malicious injury. There the court examined the whole record in reaching its conclusion.

The case of *Reell* v. *Cent. Ill. E. & G. Co.*, 317 Ill. App. 106, should be brought to this court's attention in this connection. It was cited in this case in the Appellate Court of Illinois as an authority for the position taken in this case. The *Reell* case was, like this, a garnishment upon a personal injury judgment; there, there were counts of negligence, and one wilful and wanton count, which charged that the truck was driven so as to *cause* it to strike the plaintiff. And there were instructions to the jury in the record on the question of wilful and wanton misconduct. The Court sustained the judgment over the discharge in bankruptcy, citing *In re Greene*, 87 Fed. (2d) 951, above digested as authority. The case also cites the said case of *Harris* v. *Piggly-Wiggly Stores*, 236 Ill. App. 392, and shows that in the Piggly Wiggly case, "the wilfulness and wantonness charged was limited to the driving of the truck," while in the *Reell* case, the charge was that the "defendant wilfully and wantonly drove his car so as to cause the same to strike the plaintiff" (P. 111).

For another reason, we call the court's attention to this *Reell* case, for it had counts in both negligence and wilful and malicious injury. The question seems to have been raised there, the contention being made, "that the verdict

was a 'straight negligence verdict' and that the judgment entered upon it indicates that 'there was no intention to involve malice in the action' " (P. 112). The Court there held, erroneously we say, that the presumption was that the judgment was based upon the wilful and malicious count, basing its decision upon the ruling of the Supreme Court of Illinois that where there are the two types of counts in a complaint upon which a general judgment rests, without specifying which, "the presumption is that the verdict is based upon a cause of action, of which malice is the gist." (Citing *Greene* v. *Noonan*, 372 Ill. 286.)

But we point out that that was held in a case where an insolvent debtor sought to be released under the Illinois Insolvent Debtors Act, from imprisonment under a body capias where the burden was on him to show the court that he was not imprisoned for a judgment based on a cause of action of which malice was the gist. This he was privileged to do so as to overcome the presumption (*Buck* v. *Alex*, 350 Ill. 167; *Jernberg* v. *Mix*, 199 Ill. 254).

That case is not controlling here, but really illustrates this case to the contrary. There the defendant was asking to be relieved, and he had the burden of showing that he was not cast in a judgment for malice. In this case, the Bankruptcy Court has given a general discharge which *prima facie* applies to all obligations of the bankrupt. The shoe is on the other foot, so to speak. In the insolvency case, the defendant has the burden of showing no malice in the judgment against him; but in the Bankruptcy case, where the defendant pleads his discharge in bankruptcy, the burden is on the plaintiff to show that his judgment is based on a wilful and malicious injury. Obviously, the distinction escaped the observation of the Appellate Court of Illinois in the *Reell* case.

That the burden of proof is on the plaintiff where a discharge is pleaded to his judgment, is stated by the Supreme Court of Illinois in *Van Norman* v. *Young*, 228 Ill. 425, as follows:

> "The discharge, it is true, is general in its terms, and *prima facie* as a discharge of the bankrupt from all his debts. But the creditor may notwithstanding show that his debt is of the excepted class. The onus, however, is on him, and if he fails to make the proof, the debt will be taken to be one of the ordinary character. * * * The burden of proof is upon the plaintiff to show that the claim sued on is not within the terms of the bankrupt's discharge."

The holding of the Illinois Supreme Court, above quoted, was cited with approval by this court in *Kreitlein* v. *Ferger*, 238 U. S. 21, 26, where it is stated that:

> "Where a discharge is pleaded, and proven, it is *prima facie* under the statute, and the burden is then cast upon plaintiff to show that the debt sued upon was by law, excepted from the operation of the discharge."

We therefore respectfully suggest that if it be considered that the complaint states a cause of action for a wilful and malicious injury, still as no one can say on which cause of action the judgment rests it is discharged; and it is discharged because the plaintiff did not maintain her burden of proof by presenting a record conclusive upon the point. That the judgment *may* be for one *or* the other, negligence, or wilfulness, does not overcome the presumption of discharge; where there is uncertainty the discharge operates.

III

A JUDGMENT BASED UPON WANTON CONDUCT IS DISCHARGEABLE IN BANKRUPTCY AS THE CHARGE DOES NOT CONTAIN THE ELEMENTS OF WILFUL AND MALICIOUS CONDUCT. WILFULNESS, WANTONNESS, AND NEGLIGENCE ARE SEPARATE AND DISTINCT CAUSES OF ACTION.

The specific finding of the Appellate Court of Illinois that there was no wilfulness, but only wantonness in the record is inconsistent with its general holding that malice is the gist of the action, for there is no malice in wanton misconduct.

The Supreme Court of Illinois has long considered the terms wilful and wanton as synonymous in its dealing with records where contributory negligence has been in question. (*Waldrens Express* v. *Krug,* 291 Ill. 472). As is known, contributory negligence is not a defense to either wilful or wanton misconduct, and that seems the reason why no distinction has been drawn; none was necessary.

But that there is a distinction and a difference between wilful misconduct, and wanton misconduct, is now becoming generally conceded. One is wilful, the other is reckless. They are two different causes of action.

Lately, the growth of the law, particularly automobile law, has compelled a recognition of the distinction for a judgment for wilful and malicious injury is not dischargeable in bankruptcy, while a judgment for wanton misconduct is dischargeable as having no element of wilfulness and malice in it.

The case of *Rogers* v. *Doody,* 119 Conn. 532, well illustrates the distinction. The guest statute of Connecticut denies a right of action to a nonpaying guest, 'unless such accident shall have been intentional on the part of such owner or operator, or caused by his heedlessness or his reckless disregard of the rights of others.''

There an action was brought on the Statute charging reckless disregard for the rights of plaintiff, and a judgment passed for plaintiff. The defendant filed a petition in bankruptcy scheduling such judgment, and was discharged. The plaintiff threatened action on the judgment, and defendant applied for an injunction and action thereon was restrained. The Supreme Court of Connecticut held that the right of action was for wanton misconduct and was dischargeable.

The court there said that there was a difference in kind between negligence and recklessness, and between recklessness and intentional wrong doing, and that they were three different types or causes of action, and that to constitute wilful injury, there must be design, purpose, and intent to do wrong and inflict injury; and that heedless and reckless disregard for the rights of others constitutes wanton misconduct.

The Court held that the discharge operated against the judgment based upon wanton misconduct.

This Court had opportunity lately to pass upon the distinction and difference between wilful misconduct and wanton misconduct, when it denied certiorari in the case of *Evens* v. *Texas Pac. Mo. Pac. Ter. R. R.*, 134 Fed. (2d) 275 (Certiorari Denied, 319 U. S. 756; 63 S. Ct. 1175.) The Fifth Circuit held the conduct of a red cap in pushing his truck of luggage forward through a gateway after seeing the plaintiff in his pathway twenty five feet away; without looking again to see if she had cleared the line of travel of his truck, he pushed his truck through the gate, while he kept his eyes on the sides of the gate to see if his truck cleared. The plaintiff there was traveling on a pass and, as consideration therefor, she had assumed all risk, so the company was liable only for wilful or wanton misconduct of its servants. It was conceded in the case that there

was no wilful misconduct, and the question presented was whether there was a right of action for wanton misconduct. The Circuit Court of Appeals there said (P. 276):

> "The negligence of the red-cap was not wilful, for that term usually connotes an act intentionally done for the purpose of causing injury, but we think the evidence made an issue for determination by the jury as to whether the servant was guilty of wanton negligence."

The Court there further said:

> "Wanton negligence may be generally defined as an act (or failure to act, when there is a duty to act) in reckless disregard of the rights of another, coupled with a consciousness that injury is a probable consequence of the act or omission."

The trial court having dismissed the suit, its judgment was reversed, and the cause remanded for further proceedings not inconsistent. Judge Hutcheson concurred as to the definition of wanton misconduct, citing the text of A. L. I. Torts Restatement, Sec. 500, p. 1293, 1294, and other authorities, but dissented on the ground that there was a complete absence of consciousness of danger in the mind of the red-cap. That, however, was a factual element.

The denial of certiorari upon that record was in legal effect an affirmance by this court of the holding of the Circuit Court of Appeals that there may be wanton negligence, when wilful negligence is absent, and that they each are separate and distinct cause of action.

In recognition of the growing necessity to differentiate between wilfulness and wantonness, as separate types or causes of action, the American Law Institute Torts Restatement Section 500 has made several concrete state-

ments concerning the aspects of these two kinds of conduct to which we refer.

And so we say that if the theory of the Appellate Court of Illinois was right that the conduct of defendant was wanton then only the conclusion was wrong, and the conclusion should have been in accord with *Rogers* v. *Doody*, 119 Conn. 532.

And we suggest that when the complaint in this case is closely examined, it is seen that it does no more than charge recklessness for it does not charge knowledge of the presence of the plaintiff, and does not charge that the conduct called wilful and wanton was aimed at plaintiff; hence at its strongest viewpoint, it charges only recklessness, no matter in what language the pleader has couched the charge.

Conclusion

We, therefore, respectfully suggest that the decision of the Illinois Appellate Court is out of harmony with other well considered cases, and modern concepts of the law of wilful and wanton misconduct.

And we further suggest that in the exercise of the discretion reposed in this court, the writ of certiorari be granted and the cause reviewed.

All of which is respectfully submitted,

Edward S. King,
Ode L. Rankin,
Attorneys for Petitioner.